RECENT CASES.

AGENCY—RATIFICATION—An assistant to a city engineer placed his motorcycle in the yard of the plaintiff's father while he went to telephone a truckman to deliver a number of manhole covers, which, however, had been previously ordered by a city official. During his absence his motorcycle fell and broke the plaintiff's leg. *Held:* In ordering the covers the assistant acted as a mere volunteer and the subsequent payment of the truckman's charge by the city was not a ratification. Keedy v. Inhabitants of Amherst, 109 N. E. 817 (Mass. 1915).

Where one adopts the unauthorized act of another who has purported to act in his behalf, he will be deemed to have assumed responsibility therefor by the well-known principle of ratification. This doctrine is not confined to acts arising from contractual dealings, but, as is indicated in the principal case, applies as well to acts which result in or are founded upon a tort. Dempsey v. Chambers, 154 Mass. 330 (1890); National Ins. Co. v. Minch, 53 N. Y. 144 (1873); Lane v. Black, 21 W. Va. 617 (1882). Ratification need not be made expressly, but will be implied from conduct. Campbell v. Millar, 84 Ill. App. 208 (1899); Hartlove v. Fait Co., 89 Md. 254 (1899). Except in those cases where the principal intentionally assumes responsibility without inquiry, a ratification is not binding unless made with a full and complete knowledge of all the material facts. Manning v. Leland, 153 Mass. 510 (1891); Pittsburg Mining Co. v. Scully, 145 Mich. 229 (1906). If an act done or a contract entered into by one person in behalf of another is illegal and void, it cannot be ratified. Shepardson v. Gillette, 133 Ind. 125 (1892); Spence v. Cotton Mills Co., 115 N. C. 210 (1894); Building and Loan Assn. v. Walton, 181 Pa. 201 (1897). If the principal did not have such an interest in the subject matter of the transaction as would have enabled him personally to do the act, or if he has since parted with such interest, then he is powerless to ratify the act of the agent. Krumdick v. White, 107 Cal. 37 (1895); Upton v. Dennis, 133 Mich. 238 (1903).

When one discovers that there have come into his hands the proceeds of an unauthorized act done in his behalf, it is his duty to return such proceeds as far as possible, and a failure to do so will be considered a ratification of the act. Disbrow v. Secor, 58 Conn. 35 (1889); Coykendall v. Constable, 99 N. Y. 309 (1885). He must repudiate such act within a reasonable time, Whitley v. James, 121 Ga. 521 (1904); Wright v. Baynton, 37 N. H. 9 (1858); but silence or delay in not repudiating does not in all cases amount to ratification, Dugan v. Lyman, 23 Atl. 657 (N. J. 1892); Dean v. Gray Bros., 109 Cal. 433 (1895); unless the rights of innocent third parties have been prejudiced, Smith v. Fletcher, 75 Minn. 189 (1889); Norden v. Duke, 120 N. Y. 1 (1907).

ASSAULT AND BATTERY—DEFENSE OF PROPERTY—ATTACHMENT—An owner of goods in order to maintain possession of them assaulted a constable who had seized them under an attachment as the property of another. *Held:* He was guilty of an assault and battery. State v. Selengut, 95 Atl. 503 (R. I. 1915).

The principal case is in accord with those cases which hold that where an officer attempts to take goods belonging to one person, and in his possession, upon a writ against another person, the one in rightful possession of the goods has no legal right to defend such possession against the officer by force. State v. Downer, 8 Vt. 424 (1836); State v. Richardson, 38 N. H. 208 (1859); People v. Hall, 38 N. Y. 404 (1884). But in some states it has been held that the rightful owner of goods is warranted in maintaining his possession by force against the officer, under such circumstances, in the same manner as he might against a trespasser. Smith v. State, 105 Ala. 136 (1894); Wentworth v. People, 5 Ill. 550 (1843); Comm. v. Kennard, 8 Pick. 133 (Mass. 1829). The latter decisions have been criticised by those courts maintaining the contrary doctrine as laying down an unsafe and impracti-

cable rule, having a tendency to promote disturbances of the peace. State v. Richardson, *supra*. Of course if the person making the seizure is not a duly authorized officer, the owner may use as much force as necessary to retain possession of his property. State v. Briggs, 25 N. C. 357 (1843).

ATTORNEY AND CLIENT—SUBSTITUTION OF ATTORNEY—The plaintiff employed an attorney for a contingent fee, who in good faith but without authority arranged for a settlement, whereupon the litigant applied for the substitution of another attorney. *Held:* The application should be granted without prejudice to the first attorney's claim under the contract for compensation. Friedman v. Mindlin, 155 N. Y. S. 295 (1915).

A client has a right to change his attorney at any stage in the proceeding. New York Phonograph Co. v. Edison Phonograph Co., 150 Fed. 233 (1907); Crosby & Fordyce v. Hatch, 135 N. W. 1079 (Iowa 1912). This rule applies where the retired attorney is employed for a contingent fee. Gage v. Atwater, 136 Cal. 170 (1902); Du Bois v. City of New York, 134 Fed. 570 (1904). But it has been held, where the litigant had not paid his solicitor, that it was improper for the court to order substitution, without any cause having been shown other than a disagreement as to the amount of the fee. Lanagan v. Codd, 136 N. W. 398 (Mich. 1912). If the client has conveyed to the attorney an interest in the cause of action, such that there was a power coupled with an interest, the contract is not revocable at will. Gulf, etc., Co. v. Miller, 21 Tex. Civ. App. 609 (1899). However, the conveyance to an attorney of part of a piece of land, the title to which is in dispute, does not preclude the substitution of an attorney in case of neglect to prosecute. People ex rel. Downer v. Norton, 16 Cal. 436 (1860). An order of court substituting one attorney for another has no effect upon the latter's legal rights under the contract, other than the right to continue in the case. Root v. McIlvaine, 22 Ky. L. 7 (1900).

The order of substitution should provide for the first attorney's compensation. Naiburg v. Goldin, 149 N. Y. S. 495 (1914). While it has been held that where an attorney is substituted the first can recover only for disbursements and services rendered, Parish v. McGowan, 39 App. D. C. 184 (1913); De Angelis v. Bank for Savings, 132 N. Y. S. 295 (1911), there are cases in which he was allowed to recover the percentage agreed upon. MacKie v. Howland, 3 App. D. C. 461 (1894); Carlisle v. Barnes, 102 App. Div. 573 (N. Y. 1905). Where the fee is contingent some courts assure a lien upon the ultimate judgment, and secure immediate reimbursement of expenses incurred. Carver v. United States, 7 Ct. Cl. 499 (1871); Ronald v. Mutual etc. Ass'n, 30 Fed. 228 (1887).

BANKS AND BANKING—CASHIER'S AUTHORITY TO ISSUE DRAFTS—A cashier drew a draft on another bank without authority. *Held:* The bank was liable. Pemiscot Bank v. Central State Bank, 177 S. W. 74 (Tenn. 1915).

A bank can act only through its agents, and since they are held out to the public as having authority to act according to the general usage and custom of the business, the acts of a cashier within the scope of that business will generally bind the bank in favor of third persons. Wakefield Bank v. Truesdell, 55 Barb. 602 (N. Y. 1864); McBoyle v. Union Bank, 122 Pac. 458 (Cal. 1912). A cashier must also be held to possess such other authority as he is held out to possess, and the bank is bound by acts within his apparent authority. Pattison v. Syracuse Bank, 80 N. Y. 82 (1880); National Bank v. Equitable Trust Co., 223 Pa. 328 (1909). Secret instructions will not avail the bank as against third persons without notice. Nat. Bank v. Nat. Bank, 116 Ala. 520 (1897). But the general authority of a cashier does not authorize him to issue drafts of the bank for himself or for his private use. Lamson v. Beard, 94 Fed. 30 (1899); Mendel v. Boyd, 71 Neb. 657 (1904); Trust Co. v. Stallo, 147 N. Y. S. 493 (1914). So a creditor taking a draft drawn to the cashier's own order, does so at his own risk and is put on

notice that the fiduciary is discharging his own obligation. Gale v. Chase Bank, 104 Fed. 214 (1900). For a criticism of this doctrine of constructive notice and the resulting burden on commercial paper, see in addition to the principal case, Goshen Bank v. State, 141 N. Y. 379 (1894).

BILLS AND NOTES—PAYEE A "HOLDER IN DUE COURSE"—A debtor delivered his note, payable to a third person and subject to certain equities, to his creditor, who transferred it to the payee, without notice of the equities, in part satisfaction of a claim. *Held:* The payee was a holder of the note "in due course." Brown v. Rowan, 154 N. Y. Supp. 1098 (1915).

Where a negotiable instrument is transferred before its maturity, in payment of a pre-existing debt, the transferee is a holder for value, and takes the paper free from the equities existing between the parties. This is the rule both at common law, Blanchard v. Stevens, 3 Cush. 162 (Mass. 1849); and under the Negotiable Instruments Law. Broderick Rope Co. v. McGrath, 142 N. Y. Supp. 497 (1913). The majority rule at common law is, that the holder of a negotiable promissory note, taken as collateral security for a pre-existing debt, is a holder for value in due course. Straughan v. Fairchild, 80 Ind. 598 (1881). This rule is followed by those states which have adopted the Negotiable Instruments Law, even though they previously followed the minority rule, that such a holder was not a holder for value. In re Hopper Morgan Co., 154 Fed. 249 (1907); Brooks v. Sullivan, 129 N. C. 190 (1901). See also 1 Amer. & Eng. Cases 272. The payee of a negotiable promissory note may be a holder in due course, and claim the protection accorded any other *bona fide* holder for value, both at common law, Watson v. Russell, 5 B. & S. 968 (Eng. 1864); and under the Negotiable Instruments Law. Boston Steel Co. v. Steuer, 183 Mass. 140 (1903).

BILLS AND NOTES—PROMISSORY NOTE—CONVERSION OF COLLATERAL AND LIABILITIES OF PARTIES—Following the conversion of bonds by the payee of a promissory note the sale netting more than the amount of the note in security of which they were pledged as collateral, the maker was sued on the original note. *Held:* The maker was entitled to have the proceeds used for the payment of the note. Wagner v. Kohn, 225 Fed. 718 (1915).

The rule of procedure in a majority of states permits the pledgor to take the conversion of the collateral as a defense by way of counterclaim to an action of debt on the note. Stearns v. Marsh, 4 Denio 227 (N. Y. 1847). Where the pledgor sues in trover for conversion and the debt is still unpaid the rule is that the pledgee may have the amount of his debt recouped in the damages. Jarvis v. Rogers, 15 Mass. 389 (1819). It has been held that the same principle should be applied when the pledgee sues after the conversion. Donnell v. Wyckoff, 49 N. J. L. 48 (1886). This reasoning and authority was cited and followed in the principal case. The opposite view is that the debt is a complete contract independent of the pledge and not being the same transaction recoupment cannot be allowed. Savings Bank v. Jackson, 67 Me. 570 (1878). Reference was made in the principal case to the two views on the return of collateral securities upon payment of the principal note, though it was unnecessary for a decision. The common law rule is that such return of the security is not a condition to be performed before or concurrently with the payment. Scott v. Parker, 1 Q. B. 809 (Eng. 1841); Moores v. Woods, 5 N. H. 297 (1830); Chapman v. Clough, 6 Vt. 123 (1834). It has been held that even a promise not to sue before surrendering the securities will not bar a suit by the creditor still in possession of the collateral. Foster v. Purdy, 5 Metc. 442 (Mass. 1843). It has been held that bringing action is clearly permissible, since a judgment is not payment—the debt still remains, only in a new form, and the pledge need not be surrendered. Donnell v. Wyckoff (*supra*). Under the opposite view a refusal to return the collateral is a justification for non-payment of the note. Schlesinger v. Wise, 94 N. Y. S. 718 (1905). It has been held that the agreement is implied to restore the collateral on, and simultaneous with, payment of the note. It is

on the same ground with surrender of the cancelled note. Ocean Bank v. Fant, 50 N. Y. 474 (1872). In bringing action the collateral must either be produced or satisfactorily accounted for and it is of no avail that the collateral has subsequently become worthless. Stuart v. Bigler's Assignees, 98 Pa. 80 (1881).

CARRIERS—DUTY TO HOLD TRAIN—IS ONE WHO ASSISTS ANOTHER ABOARD A TRAIN A PASSENGER?—A party who had boarded a train to assist passengers to a seat without notifying the conductor, was injured in alighting after the train had started. *Held:* Such a person is not a passenger and cannot recover. Ft. Worth & D. C. Rwy. Co. v. Allen, 179 S. W. 62 (Texas 1915).

The general rule is that when one assists a passenger aboard a train, not intending to become a passenger himself but rather to leave the train after rendering such aid, no duty arises on the carrier's part to hold the train unless knowledge of such purpose has been communicated to its servant. Seaboard Air Line v. Bradley, 125 Ga. 193 (1906). This rule applies irrespective of the time of the stop made at the station. Dunne v. N. Y. N. H. & H. R. Co., 91 N. Y. Sup. 145 (1904). This was extended in the principal case to where the train failed to remain even for its usual scheduled stopping time. It has been held that even the failure of the carrier itself to offer assistance may be too remote to cause the duty to arise. Flaherty v. B. & M. R. R. Co., 186 Mass. 567 (1904). But of course, though not possessing the rights of a passenger, one who assists is entitled to demand ordinary care for his protection. Railway Co. v. Lawton, 18 S. W. 543 (Ark. 1892). Where the carrier has either actual or constructive notice that one has entered to assist, the duty arises to allow reasonable time for such person to alight. Lucas v. N. B. & T. R. R. Co., 6 Gray (Mass.) 64 (1856). But it has been held to be no part of the conductor's duty to listen to the conversation of persons entering or to take notice of what they say. Berry v. Louisville & N. R. Co., 109 Ky. 727 (1901). Nor need he forbear from signaling train to proceed upon seeing one walking in the aisle, or even coming out on the platform after aiding a passenger. Dunne v. R. R. Co., *supra.* In such situation a suggestion as to how to alight where the person is determined to get off is not construed as an invitation. Flaherty v. B. & M. R. R. Co., *supra.* Knowledge is generally held to be communicated when assistance is rendered an invalid passenger, L. & N. R. R. Co. v. Crunk, 119 Ind. 542 (1889); and here it is the conductor's duty to use ordinary care to ascertain whether the one assisting has alighted. Bishop v. Illinois Central, 77 S. W. 1099 (Ky. 1904).

CARRIERS—LIABILITY FOR INJURY TO LIVE STOCK—PRESUMPTION OF NEGLIGENCE—Where two horses were found dead at the termination of a shipment the shipper could only show delivery in good condition and no evidence that the condition was attributable to the carrier. *Held:* Negligence of the carrier could not be presumed. Hall v. Penna. R. R. Co., 60 Pa. Super. Ct. 235 (1915).

The jurisdictions differ on this question of presumption of negligence and burden of proof. In England the shipper must affirmatively show the carrier's negligence. Smith v. Midland R. R. Co., 57 L. T. (N. S.) 813 (1887). The American courts note a distinction between live stock committed exclusively to the carrier's care and that shipped under a contract by which the owner, in person or by agent, accompanies the stock. Chicago etc. R. R. Co., v. Williams, 61 Neb. 608 (1901). In the latter case the rule is that the carrier must first be proven negligent. St. Louis R. Co. v. Weakly, 50 Ark. 397 (1887). It has been held that this is because the stock is not in the carrier's exclusive custody. Terre Haute R. Co. v. Sherwood, 132 Ind. 129 (1892). Where stock is unaccompanied, loss or injury puts the burden of proof upon the carrier. Burke v. U. S. Express Co., 87 Ill. App. 505 (1899).

The question of when there is an injury and what constitutes such is determinative of the presumption of negligence. The shipper must establish the injury before the carrier need rebut the presumption. Hussey v. Sara-

gossa, 3 Woods 380 (U. S. 1876); Penna. R. R. Co. v. Raiordon, 119 Pa. 577 (1848). This latter case was held to govern the principal case. It has been held the presumption will not be indulged where the proof adduced excludes the idea that the accident was due in whole or in part to any other cause than an inherent vice. Thomas v. Wells Fargo Express Co., 95 S. W. 724 (Texas 1906). It has been held that no presumption is raised where the injury occurred in consequence of the "vitality of the freight." Hayman v. R. R. Co., 8 N. Y. S. Rep. 86 (1886). Negligence is still presumed even if it might have been due to an act of God so long as it might also have resulted as well through the carrier's fault. Lindsley v. Chicago R. Co., 36 Minn. 539 (1887).

CONSTITUTIONAL LAW—DECISION OF SUPREME COURT BINDING ON STATE COURT—A state supreme court held a state statute void, which was partially in conflict with a previous federal statute. The United States Supreme Court later interpreted the federal statute contrary to the judgment of the state court. *Held:* The state court should follow the judgment of the Supreme Court, notwithstanding the rule of *stare decisis*. Berkshire County v. Cande, 109 N. E. 838 (Mass. 1915).

A state supreme court is not bound by the decision of the Supreme Court except in cases, where the judgment might be reviewed, as arising under the Constitution and laws of the United States. Elliott v. Superior Court of San Bernardino Co., 145 Pac. 101 (Cal. 1915); Stevens & Russell v. St. Louis Ry. Co., 178 S. W. 810 (Tex. 1915). It is well settled that in such a case the rule of *stare decisis* does not apply. Moss & Bro. v. Ramey, 136 Pac. 608 (Idaho 1913); Dooley v. Seaboard Air Line Ry. Co., 79 S. E. 970 (N. Car. 1913); Bartles Northern Oil Co. v. Jackman, 150 N. W. 576 (N. Dak. 1915). It is also a well-settled principle of constitutional law in the interpretation of statutes, that one part of a statute may be contrary to the Constitution while the rest may stand as valid, if its provisions are separable and independent of each other. People v. Van De Carr, 86 N. Y. Supp. 644 (1904); Com. v. Shaleen, 30 Pa. Super. Ct. 1 (1905). Thus in the principal case those parts of the state statute, not in conflict with the federal statute, had the full force of law.

CONSTITUTIONAL LAW—*Ex Post Facto Law*—A statute provided that no person should be eligible to the office of city commissioner who should have held such office for three consecutive years within the four years preceding the date of election. *Held:* This was not an *ex post facto* law. State v. Teasley, 69 So. 723 (Ala. 1915).

The principal case is in accord with the general rule that an *ex post facto* law must be one which imposes a punishment for an act which was not punishable when it was committed and imposes additional punishment, or changes the rules of evidence by which less or different testimony is sufficient to convict. Calder v. Bull, 3 Dall. 386 (U. S. 1798); State v. Malloy, 78 S. E. 995 (S. C. 1913); Comm. v. Phelps, 96 N. E. 349 (Mass. 1911). The constitutional provision against such laws is applicable only to penal or criminal cases. De Pass v. Bidwell, 124 Fed. 615 (1900); Pittsburg & St. L. Ry. Co. v. Lightheiser, 78 N. E. 1033 (Ind. 1906); Eckles v. Wood, 136 S. W. 907 (Ky. 1911). A statute altering the compensation of public officers is not an *ex post facto* law. Comm. v. Bailey, 81 Ky. 395 (1883). The provision does not apply to an employers' liability act. Pittsburg and St. L. Ry. Co. v. Lightheiser, *supra*.

CONSTITUTIONAL LAW—SUIT AGAINST A STATE—NOMINAL PARTIES—Members of the State Banking Board and the Bank Commissioner of Oklahoma were sued by a corporation of the state of Maine, depositors in an Oklahoma bank, to compel payments from the Depositors' Guaranty Fund, established by the legislature of the state. *Held:* This was a suit against the state, and,

under the Eleventh Amendment, could not be maintained in the Federal Court. Lankford *et al.* v. Platte Iron Works Company, 235 U. S. 461 (1915).

The Constitution was early interpreted as authorizing a suit against a state by an individual of another state in the federal courts. Chisholm v. Georgia, 2 Dallas 419 (U. S. 1793). This decision led to the passage of the Eleventh Amendment in 1798, which prohibits such suits. It was at first held that the state had to be the nominal party in order to be immune from suit under the amendment. Osborn v. Bank, 9 Wheat. 738 (U. S. 1824). But this rule was soon abandoned, and the question now is whether the state is the real party defendant and the court will go behind the mere formal parties to ascertain this. Hagood v. Southern, 117 U. S. 52 (1886). The principal case is in accord with the decisions in holding that when an officer of the state is sued to compel affirmative action, involving discretion, in pursuance of a statute, that this is in effect a suit against the state and cannot be maintained in the federal courts. Hagood v. Southern, *supra;* Louisiana v. Jumel, 107 U. S. 711 (1882); Murray v. Wilson Distilling Co., 213 U. S. 150 (1909). The state, however, may waive this immunity from suit under the Eleventh Amendment. Clark v. Barnard, 108 U. S. 436 (1882). But these cases are to be distinguished from those where the relief sought is the performance of a plain official duty, requiring no exercise of discretion, or where state officers under color of a state authority which is unconstitutional have invaded and violated personal and property rights, in which cases an action against the officer to restrain him from proceeding under any authority granted by such statute is not considered an action against the state. The Virginia Coupon Cases, 114 U. S. 269 (1884); Prout v. Starr, 188 U. S. 537 (1903); Smythe v. Ames, 169 U. S. 466 (1898).

CORPORATIONS—STOCKHOLDERS' LIABILITY—SUBSCRIPTION TO STOCK—Stock, part as a bonus, was issued to one who accepted and receipted for it, but made no formal subscription. A creditor of the corporation sued to hold him liable, as a stockholder, to the amount of the face value of the stock. *Held:* He was liable as a stockholder. Sullivan v. Farnsworth, 179 S. W. 317 (Tenn. 1915).

It is generally held that a formal subscription is unnecessary to make a stockholder liable when he receipts for, accepts and holds the certificates. Harrison v. Heathorn, 6 Man. & G. 81 (Eng. 1843); Clevenger v. Moore, 71 N. J. L. 148 (1903). The contract of subscription may be a parol one. Cookney's Case, 3 De G. & J. 170 (Eng. 1858); Somerset Co.'s Receiver v. Adams, 72 S. W. 1125 (Ky. 1903); 1 Cook on Corporations, sec. 52. In England three things are necessary to bind one as a stockholder: application, allotment, and notice of the allotment. *Re* Northern Mfg. Co., 63 L. T. 369 (Eng. 1890). A mere acceptance, even though the stock is a bonus, is sufficient subscription and creates a liability. French v. Busch, 189 Fed. 480 1911); Sullivan v. Farnsworth, *supra;* Thompson: Liability of Stockholders, sec. 105. In most jurisdictions unpaid subscriptions are liable for corporate debts, only after the remedy against the corporation has been exhausted. Handy v. Draper, 89 N. Y. 334 (1882); Burch v. Taylor, 1 Wash. 245 (1890). *Contra.* Parmelee v. Price, 208 Ill. 544 (1904). But if the corporation is bankrupt, stockholders may be sued at once. Knight Co. v. Brick Co., 46 So. 285 (Fla. 1908); Shellington v. Howland, 53 N. Y. 371 (1833). In some states a creditor who is also a stockholder, may sue his co-stockholder. Knowles v. Sandercock, 107 Cal. 629 (1895); Fowler v. Robinson, 31 Me. 189 (1850); Mendenhall v. Duluth Co., 72 Minn. 312 (1896). But the weight of authority seems against this practice. Thompson v. Meisser, 108 Ill. 359 (1884); Thayer v. Union Tool Co., 70 Mass. 75 (1855); Mathez v. Neidig, 72 N. Y. 100 (1878). As in the case of unpaid subscriptions, stockholders are liable only after remedy against the corporation is exhausted, in most jurisdictions. Globe Pub. Co. v. State Bank, 41 Neb. 175 (1894); Mean's Appeal, 85 Pa. 75 (1877); Allen v. Arnold, 18 R. I. 809 (1895). There are, however, some jurisdictions holding *contra* to this. Culver v. Third Nat'l Bank, 64 Ill. 528 (1871); Bird

Co. v. Calvert, 22 S. C. 292 (1884). Generally, stockholders are liable only for the value of their stock; and statutes extending their liability will be construed very strictly. Brunswick Co. v. Nat'l Bank, 192 U. S. 386 (1904); Moyer v. Penna. Slate Co., 71 Pa. 293 (1872).

CRIMINAL LAW—USE OF MAILS TO DEFRAUD—The president of a corporation mailed a false statement of the corporation's financial condition to another company for the purpose of borrowing money and was indicted and convicted under section 215 of the Criminal Code of the United States (Act March 4, 1909, c. 321) 35 Stat. 1130 (Comp. St. 1913, p. 10385). *Held:* He was properly convicted. Bettman v. U. S., 224 Fed. 819 (1915).

Section 215 of the Code reads as follows: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money under false pretences, shall for the purpose of executing such scheme, place any letter, writing or advertisement in any post office of the United States. . . . shall be punished . . . ." Under the original statute (June 8, 1872, 17 Stat. 323), the words "scheme" and "artifice" were held to embrace only "swindling devices smacking of the confidence game." Hess v. U. S., 124 U. S. 485 (1887). By the amendment of March 2, 1889 (25 Stat. 873), its scope was expanded to reach all classes of individuals who use the mails for fraudulent purposes. Scheinberg v. U. S., 213 Fed. 759 (1914). The federal courts have not, however, been uniform in their interpretation of the statute. The majority of the decisions seem to hold with the principal case that the term "artifice" includes fraud practiced in the prosecution of legitimate business, as well as devices inherently dishonest. Harrison v. U. S., 200 Fed. 662 (1912); U. S. v. Steven, 222 U. S. 167 (1911); and that a scheme to defraud is not necessary, if there is intent to defraud. O'Hara v. U. S., 129 Fed. 551 (1904). The all-embracing scope of the statute is indicated in Durland v. U. S., 161 U. S. 306, 313 (1896), and Foster v. U. S., 178 Fed. 165, 172 (1910). It includes schemes designed to defraud specific individuals as well as those calculated to trap the public or the credulous generally. Horman v. U. S., 116 Fed. 350 (1902) (affirmed in 187 U. S. 641, 1902); Weber v. U. S., 62 Fed. 740 (1894). It embraces also devices where the use of the mails is only incidental. Brown v. U. S., 143 Fed. 60 (1906). There must be, however, an intent to defraud, and good faith in a scheme, no matter how preposterous, is a good defense. U. S. v. Post, 135 Fed. 1 (1905). The scheme, too, must be plausible, and calculated to deceive persons of ordinary comprehension; a manifest hoax or humbug is not indictable. U. S. v. Fay, 83 Fed. 839 (1897). On the other hand, a minority of the federal cases hold that the word "scheme" applies only to "cunningly devised plans that beget confidence . . . ." U. S. v. Hess, 124 U. S. 486 (1887) (decided before the amendment to the statute); U. S. v. Post, 113 Fed. 852 (1902); Etheredge v. U. S., 186 Fed. 434 (1911). But the word "artifice" has been used to denote something more than the mailing of the letter with a fraudulent intent. Etheredge v. U. S., *supra.* These cases are directly *contra* to the principal case.

DIVORCE—DESERTION—CONSENT TO SEPARATION—In pursuance of an ante-nuptial arrangement, a wife absented herself from the husband's home for extended periods to care for her invalid mother. *Held:* The husband could not regard such absence as desertion and ground for divorce unless he gave her due notice that he would no longer abide by the ante-nuptial arrangement. Croll v. Croll, 60 Pa. Superior Ct. 415 (1915).

Desertion is an actual abandonment of matrimonial cohabitation, with an intent to desert, willfully and maliciously persisted in, without cause, for the statutory period. Ingersoll v. Ingersoll, 49 Pa. 249 (1865); Rose v. Rose, 50 Mich. 92 (1883). It will be seen that the intent to desert is essential, and the mere fact that the parties do not live together does not give rise to the inference of desertion. The husband may consent, either expressly or by implication, to the wife's continued absence, but unless he revokes such consent the absence will not be considered as desertion in divorce proceedings. Simpson

v. Simpson, 31 Mo. 24 (1860); Moores v. Moores, 16 N. J. Eq. 275 (1863). Even where there are written articles of separation the consent may be withdrawn. In this respect the general American law resembles that of England, allowing a suit for the restoration of conjugal rights. Moores v. Moores, *supra;* Earl of Westmeath v. Countess of Westmeath, 2 Hagg. Eccl. Rep. Supp. (Eng. 1826). But where the assent to the separation is withdrawn, there must be a *bona fide* attempt at reconciliation, and the refusal of a mere formal request to return unaccompanied by evidence of a real desire to resume marital relations will not be considered as desertion. McIlhaney v. McIlhaney, 125 Iowa 333 (1904); Hankinson v. Hankinson, 33 N. J. Eq. 66 (1880).

EVIDENCE—PRESUMPTION OF SURVIVORSHIP—A husband and wife in their wills named each other as primary beneficiary, with the provisos that if one died before the other their foster son should be the sole beneficiary. Both were frozen to death in the same snowstorm and evidence was lacking as to which died first. *Held:* The wills should be read as though containing only the bequest to the son, such being the evident intention of the parties and there being no presumption as to survivorship or simultaneous death. Fitzgerald, *et al.,* v. Ayres, *et al.,* 179 S. W. 289 (Tex. Civ. App. 1915).

The civil law indulged in various presumptions as to the survivorship between persons who perished in the same disaster, based upon the age, sex, and physical strength of the individuals, and the assumption that the stronger would survive the weaker. Newell v. Nichols, 75 N. Y. App. 78 (1878). In California and Louisiana such presumptions have been established by statute. Cal. Code Civ. Proc. § 1963; La. Civ. Code, Arts. 936-939. At common law, however, and in all other American states, there is no presumption as to survivorship. It is a fact to be proved by the party asserting it. Fuller v. Linzee, 135 Mass. 468 (1883); Johnson v. Merithew, 80 Me. 111 (1888); Sup. Council of Royal Arcanum v. Kacer, 69 S. W. 671 (Mo. 1902). Likewise there is no presumption as to simultaneous death. Johnson v. Merithew, *supra;* Cowman v. Rogers, 73 Md. 403 (1891); Dunn v. New Amsterdam Cas. Co., 126 N. Y. Supp. 229 (1901). But there are a few cases *contra.* Kansas Pac. R. Co. v. Miller, 2 Colo. 442 (1874); Balder v. Middeke, 92 Ill. App. 227 (1902). However this may be, it is certain that in such a case the courts will dispose of the property as though death occurred at the same time. Young Women's Christian Home v. French, 187 U. S. 401 (1903); *In re* Wilbor, 20 R. I. 126 (1897); Underwood v. Wing, 24 L. J. Ch. N. S. 293 (Eng. 1855).

EVIDENCE—PREVIOUS ACTS—SPARKS FROM LOCOMOTIVES—In an action against a railroad company for the destruction of a house by fire, it was proved that a locomotive had passed just previous to the fire; and testimony was offered to prove that engines which passed the day before had emitted large sparks. *Held:* The testimony offered should have been excluded. Moose v. M. K. & T. Rwy. Co., 179 S. W. 75 (Tex. 1915).

Although the fact that a fire was caused by a passing engine may be proved circumstantially, the mere fact that an engine passed the house shortly before the fire was discovered, is not sufficient to raise an issue for the jury. Funk v. Railway Co., 100 S. W. 504 (Mo. 1907); Railway Co. v. Sadieville Mfg. Co., 137 Ky. 568 (1910). Nor is it sufficient to show a mere possibility or conjecture that the fire was started by one of the defendant company's engines. Minneapolis Sash & Door Co. v. Great Northern Rwy. Co., 83 Minn. 370 (1901). So also evidence that on the day and near the time of the fire, the same engine threw out sparks is admissible. Lake Erie & W. R. Co. v. Middlecoff, 150 Ill. 27 (1893); Jacobs v. N. Y. C. & H. R. R. Co., 107 N. Y. App. Div. 134 (1905). Under similar circumstances, except that the identity of the engine which caused the fire cannot be established, evidence of the setting of other fires, by locomotives of the company at other near times and places, is competent. Shelly v. P. & R. Rwy. Co., 211 Pa. 160 (1905); Lake St. El. R. Co. v. Peterson, 93 Ill. App. 118 (1901). Where the engine which alone could have set fire, is identified, testimony that other engines set

fires or threw sparks at other times is incompetent. Lesser Cotton Co. v. St. L. I. M. & S. Rwy. Co., 114 Fed. 133 (1902); First National Bank v. Lake Erie & W. R. Co., 174 Ill. 36 (1895).

INSURANCE—CONSTRUCTION OF POLICY—CONDITION—The holder of a life insurance policy which contained the condition that it did not insure against death caused by anything inhaled, was found dead in a room with the gas turned on. *Held:* Death was caused by "anything inhaled" within the meaning of the condition, there being nothing to show that those words were intended to mean anything voluntarily inhaled. *In re* United L. & S. Ins. Co., 113 L. T. 407 (Eng. 1915).

There are very few decisions of the English courts to be found on this point and these do not seem conclusive. The doctrine that policies are to be construed *contra proferentes,* where the meaning is clearly ambiguous, has been applied, *In re* Arbitration between Bradley and Essex & Suffolk Acc. In. Soc., 105 L. T. 919 (Eng. 1912); but see Cole v. Acc. Ins. Co., 5 L. T. 736 (Eng. 1861), where such language was held to be clear and accordingly no recovery was allowed.

In America there has been much difference of opinion as to the meaning of such conditions. The words "inhaling gas" have been held to imply a conscious and voluntary act done with knowledge of the nature of the substance inhaled. Travellers' v. Dunlop, 160 Ill. 642 (1896); Menneiley v. Employers' Liability, 148 N. Y. 596 (1896); Pickett v. Ins. Co., 144 Pa. 90 (1891). But this view has been disapproved in the federal courts. McGlother v. Provident Ins. Co., 32 C. C. A. 318 (1898); Ry. Mail Ass'n v. Dent, 213 Fed. 983 (1914). See also Macgillivray on Insurance, p. 954. It is well settled, however, that a policy, excluding injuries from "anything accidentally or otherwise inhaled," is to be construed strictly against the assured. Richardson v. Travellers, 46 Fed. 843 (1891); Preferred Acc. Ins. Co. v. Robinson, 45 Fla. 525 (1903); Fidelity v. Waterman, 161 Ill. 635 (1896).

INSURANCE—POLICY PAYABLE TO MORTGAGEE—WHO MAY SUE—A fire insurance policy was made payable to a mortgagee "as his interest might appear." *Held:* Either the mortgagor or the mortgagee could maintain an action in his own name to recover to the extent of his interest. Swaine v. Teutonia Fire Ins. Co., 109 N. E. 825 (Mass. 1915).

There is a conflict of decisions as to the proper party to maintain an action on an insurance policy, which is payable to a mortgagee. Where the claim of the mortgagee exceeds the amount of the insurance, the weight of authority is that he is the proper party to sue. Motley v. Ins. Co., 29 Me. 337 (1849); Smith v. Union Ins. Co., 25 R. I. 260 (1903); Ins. Co. v. Jones, 128 Ala. 361 (1900). Under those circumstances, the mortgagor can only sue if the mortgagee consents, or after the mortgage debt has been paid. Turner v. Ins. Co., 109 Mass. 568 (1872); Coates v. Ins. Co., 58 Md. 172 (1881). On the other hand, where the mortgagee's claim is for less than the amount due on the policy, the mortgagor is the proper party. Ins. Co. v. Felrath, 77 Ala. 194 (1884); Carberry v. German Ins. Co., 86 Wis. 323 (1893). But the later cases are contrary to this rule. Loan Ass'n v. Ins. Co., 28 Pa. Super. Ct. 341 (1905); Bacot v. Ins. Co., 50 So. 729 (Miss. 1909). Some cases allow the mortgagee to sue in the mortgagor's name. Ins. Co. v. Peterson, 187 Ill. 395 (1900). The rule in Massachusetts is given in the principal case, following Savings Bank v. Ins. Co., 166 Mass. 195 (1896). The last rule, which allows the mortgagor and the mortgagee to join in the same action on the ground of a common interest in the subject matter, goes directly into the teeth of the common law procedure, which made a joint interest in the whole of the recovery essential to a joint action at law, but is in accord with the theory of joinder of parties under the codes which have borrowed the rules of equity. Home Ins. Co. v. Gilman, 112 Ind. 7 (1887); Winne v. Fire Ins. Co., 91 N. Y. 185 (1883); Williamson v. Ins. Co., 86 Wis. 393 (1893).

LANDLORD AND TENANT—CONSTRUCTION OF LEASE—A lease described the property demised as all of a hotel building with appurtenances. A door giving access to the rear of the demised premises over other property owned by the landlord was closed by a brick wall built by the landlord as an extension to the adjoining house. *Held:* The door and passage way were appurtenant to the demised premises, and the landlord's act was a breach of his covenant for quiet enjoyment. Cohen v. Newman, 155 N. Y. Supp. 30 (1915).

The word "appurtenance" will usually be construed in connection with the principal thing conveyed, with regard also to the general intent apparent in the instrument in which it was employed as evidenced by the context and all the circumstances. Missouri Pac. Rwy. Co. v. Moffitt, 94 Mo. 56 (1887); Riddle v. Littlefield, 53 N. H. 503 (1873). So the use to which the premises demised are to be put is generally material in determining the meaning of the word, but such use is not conclusive. It is held that the conveyance of land with appurtenances will not create a right of way over other land of the grantor unless such way is absolutely necessary to give the grantee access to his land. May v. Smith, 3 Mackey 55 (D. C., 1884); Grant v. Chase, 17 Mass. 443 (1821); Oliver v. Hook, 47 Md. 301 (1877). On the other hand it has been said that "appurtenances" may not only be sufficient to convey an existing easement, but also to create one. Peck v. Loyd, 38 Conn. 566 (1871); Railroad v. Ward, 128 Ill. 349 (1889). But the general rule seems to be that the word appurtenances will only carry with it that which is reasonably necessary to the beneficial enjoyment of the property conveyed and the use to which it is to be put, and will not carry with it that which is a mere convenience even though the lessor had used it for the same business. Oliver v. Dickinson, 100 Mass. 114 (1868); Barrett v. Bell, 82 Mo. 110 (1884); Doyle v. Lord, 64 N. Y. 432 (1876).

In the principal case the majority of the court applied the rule that a lease is to be construed most strongly against the lessor who made it, and that as the door and way had been used by the lessor for the hotel business, it passed as appurtenant. It is submitted that the dissenting opinion is more in accord with the weight of authority.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD ON HEARSAY EVIDENCE—A Workmen's Compensation Commission made an award based on statements of the deceased workman as to the cause of the injury. The act provided that the commission "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure." *Held:* An award on hearsay evidence was valid. Carroll v. Knickerbocker Ice Co., 155 N. Y. S. 1 (1915).

Under the English procedure statements made by the deceased, as to his bodily or mental feelings are admissible, but those made as to the cause of his illness are not admissible in evidence. Grilby v. Great Western Railway Co., 102 L. T. 202 (Eng. 1910). *Contra:* Wright v. Kerrigan, 45 Ir. L. T. 82 (Ireland, 1911), (*semble*). Where there is no other evidence of the accident than such declarations the award will not be sustained. Wolsey v. Pethick Bros., 1 B. W. C. C. 411 (Eng. 1908); Amys v. Barton [1912] 1 K. B. 40 (Eng.). It has been held where there was other evidence, that the admission of such declaration as to the cause of the injury was ground for reversal. Smith v. Hardman & Holden, Lt., 6 B. W. C. C. 719 (Eng. 1913).

The California Act authorizes the commission to disregard "technical rules" of evidence, but a conclusion opposite to that in the principal case was reached in Englebretson v. Industrial Accident Commission, 151 Pac. 421 (Cal. 1915) and Employers' Assur. Corporation, Ld., v. Industrial Accident Commission, 151 Pac. 423 (Cal. 1915). A Michigan case took the same view but sustained a finding made after the admission of such declarations, where there was other competent evidence. Reck v. Whittlesberger, 148 N. W. 247 (Mich. 1914). In a New Jersey case deciding another question, it was held that certain directions of the court should be based "on specific findings of fact supported by legal evidence." Under a statute of

Massachusetts permitting the admission of declarations of a deceased person before a "court," it was held that the industrial board should be guided and controlled by the same general principles which would govern judicial officers in discharging the same duties. Pigeon's Case, 216 Mass. 51 (1913).

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DOES A HOMICIDE ARISE IN THE COURSE OF THE EMPLOYMENT?—A mill superintendent was shot and killed by a trespasser whom he was ordering from the premises, and whom he had been specially warned to order out. *Held:* The injury was one arising out of and in the course of the employment. *In re* Reithel, 109 N. E. 951 (Mass. 1915).

An injury "arises out of the employment" when there is apparent to the rational mind, upon consideration of all the circumstances, a casual connection between the conditions under which the work is required to be performed and the resulting injury. The injury is "in the course of the employment" when it occurs while the workman is doing the duty which he is employed to perform. McNicol's Case, 215 Mass. 497 (1913). Under most of the acts in force, both elements are necessary. McNicol's Case, *supra;* Bryant v. Fissell, 84 N. J. L. 72 (1913); Hills v. Blair, 148 N. W. 243 (Mich. 1914). The burden of producing evidence to show that the injury arose out of and in the course of the employment rests on the claimant. McCoy v. Michigan Screw Co., 147 N. W. 572 (Mich. 1914); Bryant v. Fissell, *supra.* Under some of the acts the injury must also result from an "accident," *i. e.,* an unlooked for, and untoward event, not expected or designed. Bryant v. Fissell, *supra;* Poccardi v. Public Service Commission, 84 S. E. 242 (W. Va. 1915). The decisions are sometimes difficult to reconcile, and have been influenced to no small degree by the English decisions. See Thorn v. Humm & Co., 112 L. T. 888 (Eng. 1915), and cases cited in 64 UNIV. OF PENNA. L. REV. 108.

It will be noted that the Pennsylvania Act of 1915 applies only to "an injury by an accident in the course of his employment," no mention being made of the usual "arising out of." Act of June 2, 1915, P. L. 738.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REFUSAL TO SUBMIT TO OPERATION—An injured workman refused to submit to an operation which was common and almost always successful, although attended with some danger to life. Compensation was allowed on the basis that the disability was temporary. *Held:* The refusal was reasonable and the award should have been on the basis of a permanent disability. McNally v. Hudson & M. R. Co., 95 Atl. 122 (N. J. 1915).

When an injured workman refuses to submit to an operation, two questions arise. First, was the refusal unreasonable? This is uniformly held to be a question of fact. Ruabon Coal Co. v. Thomas, 3 B. W. C. C. 32 (Eng. 1910); Jendrus v. Detroit Steel Products Co., 144 N. W. 563 (Mich. 1914.) The question is whether the refusal was unreasonable, not whether, on the balance of the medical testimony, the operation was reasonably safe. Tutton v. Owners of S. S. Majestic, 2 K. B. 54 (Eng. 1909). So, if the operation involves risk of life, the refusal is not unreasonable. Rothwell v. Davies, 19 T. L. R. 423 (Eng. 1903); Tutton v. Owners of S. S. Majestic, *supra;* Ruabon Coal Co. v. Thomas, *supra.*

Secondly, where the refusal is unreasonable, the test is whether the continued disability is the result of the refusal or the original injury. Marshall v. Orient Steam Navigation Co., Ld., 101 L. T. 584 (Eng. 1910); Floccher v. Fidelity & Deposit Co. of Md., 108 N. E. 1032 (Mass. 1915). If unreasonable refusal to submit to an operation is the cause of the continued incapacity, the workman is precluded from the right to further compensation. O'Neill v. Brown & Co., Ld. [1913] S. C. 653 (Scot.); Walsh v. Lack & Co. (Newland) Ld., 110 L. T. 452 (Eng. 1914).

PARTNERSHIP—COMPENSATION FOR EXTRA SERVICES—A partner was sole manager of a business for three years, during the disability of his co-partners.

Held: He was entitled to no extra compensation for attending to firm business. Cole v. Cole, 177 S. W. 915 (Ark. 1915).

The general rule is that a partner is not entitled to any compensation for services rendered to the partnership, further than his share in the profits, in the absence of any agreement to the contrary. Neville v. Mining Co., 135 Cal. 561 (1902); Street v. Thompson, 229 Ill. 613 (1907). The rule applies irrespective of the inequality of services rendered, compared with those rendered by the co-partners. Marsh's Appeal, 69 Pa. 30 (1871). It also applies to a surviving partner in winding up the affairs of the business. Schenkl v. Dana, 178 Mass. 236 (1875). A managing partner, although he attends exclusively to the business, receives no extra compensation. Evans v. Warner, 20 App. Div. 230 (N. Y. 1897). According to the principal case, the sickness or other disability of a partner is one of the risks incidental to the business.

Where there is an express stipulation in the partnership agreement, a partner will of course be entitled to extra compensation. Garwood v. Paynter, L. R. 1 Ch. Div. 236 (Eng. 1903); McCullough v. Barr, 145 Pa. 459 (1891). Moreover, the law may imply an agreement to pay a partner for services under certain circumstances. Mondanim Bank v. Burke, 147 N. W. 148 (Iowa 1914); Williams v. Knibbs, 213 Mass. 534 (1913); Zell's Appeal, 126 Pa. 329 (1889). A partner who performs beneficial services in a capacity other than that of partner is of course entitled to pay. Parker v. Day, 155 N. Y. 383 (1898). See also: Morris v. Griffin, 83 Iowa, 327 (1891).

PATENTS—RIGHT OF PURCHASE TO MAKE IMPROVEMENTS—An article manufactured under a patent was sold and the purchaser made certain improvements. *Held:* The article became his property and he could improve it. Burguieres Co. v. Deming Co., 224 Fed. 956 (1915).

One who buys a patented article becomes the owner thereof and can do with it as he sees fit. Chaffee v. Boston Belting Co., 22 How. 217 (U. S. 1859). Under the guise of repair or improvement, however, the vendee cannot practically reconstruct the patented article. Shickle H. & H. Iron Co. v. St. Louis Car-Coupler Co., 77 Fed. 739 (1896); American Cotton Tie Co. v. Simmons, 106 U. S. 89 (1882). The vendee cannot replace the vital and essential part of the patent. Morrin v. White Engineering Works, 138 Fed. 68 (1905). For a summary of the rules as to repair, improvement, replacement and reconstruction of patented articles, see Morrin v. White Engineering Works, *supra.* The principal case contains a good summary of the general rules and is valuable as demonstrative of their application to a particular set of facts.

PLEADING—DENIAL ON INFORMATION AND BELIEF—In an action for indemnity in which the plaintiff alleged a judgment against him by the Supreme Court of British Columbia, the defendant denied upon information and belief. *Held:* As the matter of record was in a foreign country, and not within the presumptive knowledge of the defendant, the form of the denial was good. Surety Co. v. Sandberg, 225 Fed. 150 (1915).

The distinction observed in determining whether or not a defendant may avail himself of this form of denial, is to inquire whether the facts alleged are presumptively within his knowledge. Rochkind v. Perlman, 123 App. Div. 808 (N. Y. 1908). If they are, he cannot avail himself of a denial on information and belief. A pleader's own acts, in the absence of special circumstances, are held to be within his knowledge and this form of denial insufficient, Gribble v. Brewing Co., 100 Cal. 67 (1893); likewise the making of agreements and contracts by him, Raymond v. Johnston, 17 Wash. 232 (1897); and the sale of goods to him, Weill & Co. v. Crittenden, 139 Cal. 488 (1903). Denials of indebtedness upon information and belief are insufficient. Thompson v. Seligman, 90 Fed. 219 (1898). Where the matters involved are connected with the duties of public officers, generally this form of denial is not permitted. McConoughey v. Jackson, 101 Cal. 1265 (1894). A city is generally held to have positive knowledge as to matters clearly

within the knowledge of its officers, and cannot use this denial. Phila. v. Pierson, 211 Pa. 388 (1905). Matters appearing of public record cannot as a rule be denied upon information and belief, Peacock v. United States, 125 Fed. 583 (1903). So a pleader is held to have presumptive knowledge of deeds and mortgages of record, Goodell v. Blumer, 41 Wis. 436 (1876); of recorded liens, Oakes v. Ziemer, 62 Neb. 603 (1901); of assessments of taxes, Wickersham v. Russell, 51 Pa. 71 (1865); of a judgment and all other court records to which he is a party. First Bank v. Watt, 7 Idaho 510 (1901); Steinberg v. Saltzman, 130 Wis. 419 (1907). Denial on information and belief of the plaintiff's incorporation raises no issue, Fuller Co. v. Manhattan Co., 88 N. Y. Supp. 1049 (1904). Nor can a corporation use this form of denial when the matters alleged were presumptively within the knowledge of any of its officers, Sloan v. California Ry. Co., 111 Cal. 668 (1896). The substance of the cases is that a denial on information and belief of facts which are actually or presumptively within the pleader's knowledge is insufficient and will be treated as an evasion. Avery v. Stewart, 134 N. C. 287 (1904). Matters of public record are presumptively within the knowledge of defendant because of their accessibility. Peacock v. U. S., *supra;* obviously this reason is not applicable to matters of foreign record.

PROPERTY—EASEMENT—RIGHT TO ICE ON ADJOINING LAND CAUSED BY OVERFLOW—The owner of a mill dam, with an easement of flowage over adjoining property claimed the right to take the ice formed thereby on the other land. *Held:* The ice belonged to the owner of the land exclusively. Valentino v. Schantz, 109 N. E. 866 (N. Y. 1915).

The right to maintain a mill dam and exercise the privileges belonging thereto, does not of itself confer the right to take ice formed by the flowage. Julien v. Woodsmall, 82 Ind. 568 (1882). Ice which forms on streams or ponds, the bed of which is subject to private ownership, belongs to the owner of such bed, and such owner may maintain trespass for its removal. Reysen v. Roate, 92 Wis. 543 (1896). The right to take ice grows out of the title to the bed of the stream or pond, and not out of the causation of the flowage. Bigelow v. Shaw, 65 Mich. 341 (1887); Searle v. Gardner, 13 Atl. 835 (Pa. 1888). However an upper riparian proprietor over whose land a mill owner has an easement of flowage, may not make such use of the stream, by taking ice, or otherwise, as to interfere with the successful operation of the mill. Howe v. Andrews, 62 Conn. 398 (1892).

There is a class of cases in which it has been held that one who does not hold title to the bed of a pond, may nevertheless acquire by prescription, the right to take ice therefrom as a *profit a prendre* or easement appurtenant to land. Hinckel v. Stevens, 165 N. Y. 171 (1900). The right to cut ice on a "great pond" (ten acres or more), is a public one in which the riparian proprietors have no greater interest than any one else. Brastow v. Rockport Ice Co., 77 Me. 100 (1885).

PUBLIC SERVICE CORPORATIONS—CONTRACT WITH MUNICIPALITIES—RIGHT OF CONSUMER TO SUE—A gas company was granted permission by a town board to lay its pipes in the highways of the town, on the condition that it would not charge the inhabitants more than a certain rate for gas. *Held:* The contract was enforcible by the inhabitants of the town. Farnsworth v. Gas Co., 109 N. E. 860 (N. Y. 1915).

The right of a private consumer to sue a public service corporation in his own name to enforce rights accruing to him under a contract between the city and the corporation fixing the maximum rates to be charged, was squarely held in Pond v. New Rochelle Water Co., 183 N. Y. 330 (1906), and was based on the doctrine of Lawrence v. Fox, 20 N. Y. 268 (1859), that the contract had been made for the sole benefit of the consumer. But it has been held that a private citizen has no such right to sue. Cleburne Water Co. v. Cleburne, 13 Tex. Civ. App. 141 (1896). In several cases, contracts made by a city with public service corporations have been enforced at the

suit of private consumers without any discussion as to their right to sue. Thus a consumer has been allowed to recover the amount he had paid in excess of the rates contracted for between the city and a water company, Birmingham Water Works v. Truss, 135 Ala. 503 (1903); and a church has been permitted to compel a company to supply it with free water in performance of its contract with the city, M. E. Church v. Water Co., 10 Ohio Cir. Dec. 648 (1900). It has been held that a private consumer is entitled to an injunction restraining the company from coercing him into paying a higher rate than that fixed by the contract between the company and the city, Smith v. Birmingham Water Works, 104 Ala. 315 (1893); Robbins v. Bangor Co., 100 Me. 496 (1905); or that fixed by the company's charter, Ernst v. Water Works, 39 La. Ann. 550 (1887); or by a city ordinance, Rogers Park Water Co. v. Fergus, 178 Ill. 571 (1899).

The principal case seems to conflict with the doctrine of Allen, *etc.*, Mfg. Co. v. Water Works, 113 La. 1091 (1905), which held, in accord with the great weight of authority, that a water company under contract with the city to supply water for use at fires, was not liable to suit by a private citizen for loss sustained through failure to fulfill its contract. North Carolina and Kentucky are *contra* to this latter doctrine and hold the company liable to a citizen for fire loss, on the ground that the contract was made by the municipality as agent of the citizen, who furnished the consideration by paying the taxes. Gorrell v. Greensboro Water Co., 124 N. C. 328 (1899). It is submitted that this would have been a better basis for the doctrine in the principal case.

SALES—RIGHT OF APPROVAL—DELAY—Over four months after the sale of a planer on approval, for sixty days, the vendor brought replevin for the machine against the purchaser at sheriff's sale, the vendee having gone into bankruptcy. *Held:* By the delay of the vendor he lost his right to reclaim the property. McCabe v. Northampton Trust Co., 60 Pa. Super. Ct. 18 (1915).

In a sale on approval title passes to the buyer if he fails to exercise his option within the time specified by the contract. Moline M. & S. Co. v. Pereau, 52 Neb. 577 (1897); Geiser Mfg. v. Taylor, 55 App. Div. 638 (N. Y. 1900), or, if the contract does not fix a time, within a reasonable time. Cook v. Gross, 60 App. Div. 446 (N. Y. 1901); Washington v. Johnson, 7 Humph. 468 (Tenn. 1846). If the contract fixes a period for trial, the purchaser has a reasonable time after its expiration, in which to reject the article. Springfield Engine Stop Co. v. Sharp, 184 Mass. 266 (1903); Waters Heater Co. v. Mansfield, 48 Vt. 378 (1875); Kahn v. Klabunde, 50 Wis. 235 (1880). Failure to act within such time constitutes an acceptance. Charter Gas & Engine Co. v. Barton, 39 So. 985 (Ala. 1905); Turner v. Muskegon Mach. & Foundry Co., 97 Mich. 166 (1893). Continued use of the article after the period fixed for trial operates as an acceptance, American Electric Teleph. Co. v. Emporia Teleph. Co., 83 Kan. 64 (1910); Scott v. Vulcan Iron Wks., 31 Okla. 334 (1912), even after a declaration of dissatisfaction. Wolf Co. v. Monarch Refrigerating Co., 252 Ill. 491 (1914); Aultman v. Theirer, 34 Iowa 272 (1872); Empire Steam Pump Co. v. Inman, 12 N. Y. Supp. 948 (1891). The same condition of facts which will hold the buyer in an action against him for the price, will establish his title in a replevin suit by the vendor. Hickman v. Shimp, 109 Pa. 16 (1885). See Sales Act, § 19, Rule 3, (2) (b).

SURETYSHIP—DISCHARGE OF SURETY—SURRENDER OF COLLATERAL SECURITY—Without the consent or knowledge of the surety, the maker of a note persuaded the cashier of the bank which held it to surrender stock which had been deposited as collateral. *Held:* The surety was discharged from all liability. Elsey v. People's Bank, 179 S. W. 392 (Ky. 1915).

The doctrine that a release of the security by the creditor discharges the surety is not disputed in the cases. Templeton v. Shakley, 107 Pa. 370 (1884); Plankenton v. Gorman, 93 Wis. 560 (1896). The statement in the principal case, however, that the surety is discharged from all liability, re-

gardless of the value of the collateral, does not express the prevailing view, a great majority of the states holding that the surety is released only to the extent that he has been actually damaged. Allen v. O'Donald, 23 Fed. 573 (1885); Stewart v. Davis' Executor, 18 Ind. 74 (1862); Guild v. Butler, 127 Mass. 386 (1879). Likewise, if the security for the debt is lost through negligence or want of ordinary care on the part of the creditor, the surety will be discharged *pro tanto*. City Bank v. Young, 43 N. H. 457 (1862); Shippen's Adm. v. Capp, 36 Pa. 89 (1859). Where the creditor is a bank and has funds of the debtor on deposit at the maturity of the debt, a majority of the states hold that the surety is not released if the bank fails to apply such funds toward payment of the debt. Davenport v. State Bkg. Co., 126 Ga. 136 (1906); National Bank v. Hill, 76 Ind. 223 (1881); National Bank v. Smith, 66 N. Y. 271 (1876). *Contra* Burgess v. Deposit Bank, 30 Ky. Law Rep. 177 (1906); Lawe v. Reddan, 123 Wis. 90 (1904). In Pennsylvania the rule is that the bank must apply such deposit, provided it is not less than the amount of the debt. First Nat. Bank v. Peltz, 176 Pa. 513 (1896).

After the creditor has actually surrendered the collateral, he cannot avoid the consequences of his act by alleging that it was contrary to statute for him to receive such security in the first instance. National Bank v. Stewart, 107 U. S. 676 (1882). The security must be applied upon the debt for which the surety is bound and not upon another debt owing by the principal to the creditor. Brown v. First Nat. Bank, 112 Fed. 901 (1902); Nat. Exchange Bank v. Silliman, 65 N. Y. 475 (1875). If the surety has made payment in ignorance of the fact that the collateral has been released or lost he may recover such amount from the creditor. Chester v. Bank of Kingston, 16 N. Y. 336 (1857). Likewise, if the creditor obtains a judgment and afterwards releases the security, the surety may have the judgment perpetually enjoined. McMullen v. Hinkle, 39 Miss. 142 (1860); Evans v. Raper, 74 N. C. 639 (1876).

WILLS—EXECUTION—ATTESTATION CLAUSE—Three documents were brought before the court to determine which should be admitted to probate as the will of the deceased. The two latest ones had no attestation clause and it appeared doubtful whether the witnesses signed at the same time. *Held:* The lack of attestation clauses and the surrounding circumstances were sufficient to rebut the presumption in favor of a will's due execution. *In re* Strong, 112 L. T. 997 (Eng. 1915).

To be valid, a will must be executed in accordance with the law. Kelly v. Parker, 181 Ill. (1899); Tobin v. Haack, 79 Minn. 101 (1900). The will must express the intent of the testator and be understood by him in its material parts. O'Brien v. Spalding, 102 Ga. 490 (1897); Hess's Appeal, 43 Pa. 73 (1862); *In re* Arneson's Will, 128 Wis. 112 (1906). In England and most of the states, by statutory provision, a will must be signed by the testator or by some one acting under his direction. Wills Act. 1 Vict. c. 26 (Eng. 1837); Royle v. Harris, 72 L. T. 474 (Eng. 1895); Rigg v. Wilson, 13 Ill. 15 (1851); Murry v. Hennesey, 48 Neb. 608 (1896). In Pennsylvania a will may be sustained although unsigned, if testator was prevented by the extremity of his last illness. Act of Apr. 8th, 1833, P. L. 249 s. 6; Ruoff's Appeal, 26 Pa. 219 (1856). In New Jersey the signing must be in the testator's own hand unless his last illness prevents. Matter of McElwaine, 18 N. J. Eq. 499 (1867). If the signing is not in the presence of witnesses, the signature must be acknowledged to them. White v. British Museum, 6 Bing. 310 (Eng. 1829); Crowley v. Crowley, 80 Ill. 469 (1860); *In re* Coles, 47 Atl. 385 (N. J. 1900). A formal attestation clause does not seem to be essential. Roberts v. Phillips, 4 El. & Bl. 450 (Eng. 1855); Robinson v. Brewster, 140 Ill. 649 (1892); but it is *prima facie* evidence of compliance with all the formalities. Thompson v. Owens, 174 Ill. 229 (1898); Matter of Cottrell, 95 N. Y. 329 (1884). As to the number and necessity of witnesses, the various statutes must be consulted. In Pennsylvania attesting witnesses are unnecessary, except in the case of charitable bequests. Comb's Appeal, 105 Pa. 155 (1884); Act of Apr. 26th, 1855, P. L. 322, § 11.